No. 05-1342

In the Supreme Court of the United States

LINDA A. WATTERS, COMMISSIONER,
MICHIGAN OFFICE OF INSURANCE AND FINANCIAL SERVICES,

Petitioner,

v.

WACHOVIA BANK, N.A., AND WACHOVIA MORTGAGE CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

This is such a case. The Chamber's members include not only national banks and their operating subsidiaries but also millions of other businesses subject to federal statutes and regulations that preempt state and local laws. The power of Congress (either directly or through administrative agencies) to preempt state and local law is vitally important to business and to the national economy. Accordingly, the Chamber and its members have a substantial interest in ensuring that this Court properly resolves the issues raised in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents important issues of preemption law that arise in the distinctive setting of the federal government's long-standing oversight and regulation of nationally chartered banks pursuant to the National Bank Act, 12 U.S.C. §§ 1 *et seq.*, a

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

statute enacted during the Civil War to "protect[]" the banking system "from possible unfriendly State legislation." *Beneficial National Bank* v. *Anderson*, 539 U.S. 1, 10 (2003) (internal quotations omitted). Specifically, the Court is called on to decide whether the National Bank Act and certain regulations of the Office of the Comptroller of the Currency ("OCC") preempt various Michigan laws relating to mortgage lenders insofar as those state laws are applied to the operating subsidiaries of nationally chartered banks ("operating subs"). Like every other federal court to face the question, the Sixth Circuit in this case had no difficulty concluding that the Michigan statutes as applied to such operating subs are preempted. Pet. App. 3a, 4a-12a. That decision was correct and should be affirmed.

As respondents and other *amici* supporting respondents demonstrate, this case can – and should – be decided on comparatively narrow grounds. The National Bank Act includes an express preemption clause broadly declaring that "[n]o national bank shall be subject to *any* visitorial powers except as authorized by Federal law" (12 U.S.C. § 484(a) (emphasis added)), confers on national banks the authority to exercise "all such incidental powers as shall be necessary to carry on the business of banking" (*id.* § 24 (Seventh)) as well as to engage in real estate lending "subject to * * * such restrictions and requirements as the Comptroller * * * may prescribe by regulation or order" (*id.* § 371(a)), and grants the Comptroller broad authority to "prescribe rules and regulations to carry out the responsibilities of the office" (*id.* § 93a). Pursuant to that delegated authority, the OCC has made clear, in a series of regulations, that the incidental powers of national banks under Section 24 (Seventh) include the power to establish, and conduct federally authorized banking activities through, operating subs. 12 C.F.R. §§ 5.34(e), 7.4006. Those regulations also establish that such operating subs must conduct their activities "pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by [the] parent national bank" (*id.* § 5.34(e)(3)) and that "[s]tate laws apply to national bank operating subsidiaries to the same extent that those laws apply

to the parent national bank" (*id.* § 7.4006). In distinguishing "financial" from operating subs, Congress has also indicated that operating subs must conduct their activities "subject to the same terms and conditions that govern * * * national banks." 12 U.S.C. § 24(a)(g)(3).

It is undisputed that these statutes and regulations bar Michigan from applying the laws at issue in this case directly to a national bank. Petitioner contends, however, that there is no preemption if the same laws are applied to the activities of a national bank that happen to be conducted through an operating subsidiary. To agree with that submission, this Court would have to reject the contrary conclusion of the OCC as expressed in its regulations, reject the OCC's interpretation of substantive provisions of the National Bank Act, and reject the agency's determination that Michigan's laws undermine the incidental powers of national banks conferred by Section 24 (Seventh). But this Court has *already* made clear that the Comptroller's reasonable construction of the scope of a national bank's "incidental powers" under Section 24 (Seventh) is entitled to "great weight" and full deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995). That principle dooms petitioner's challenge to the decision below.

Because petitioner cannot prevail under settled principles, she and her *amici* urge this Court to alter the legal framework governing regulatory preemption. These arguments are wrong and should be rejected. At bottom, they reflect a basic misunderstanding of the role and importance of federal preemption in our constitutional scheme.

I. Federal preemption of state and local law is not "extraordinary" (as petitioner repeatedly suggests) but rather is an ordinary, commonplace, and highly beneficial feature of our system of government. By virtue of the Supremacy Clause, *all* forms of federal law – including regulations issued by administrative agencies – have a preemptive effect on state and local law

insofar as the latter conflicts with or frustrates the purposes of federal law. This Court has long distinguished between these forms of "implied" preemption (sometimes described as "conflict" and "obstacle" preemption) that flow directly from the Supremacy Clause and "express" preemption, which occurs when Congress elects to regulate preemptively pursuant to its enumerated powers in Article I, Section 8, of the Constitution (including the Necessary and Proper Clause). Congress's exercise of preemptive lawmaking authority in this fashion raises no concern under the Tenth Amendment.

Petitioner's invocation of a "clear statement" rule and the "presumption against preemption" is misplaced. Those interpretive canons are irrelevant to this case, because the regulation of national banks (and their mortgage lending activities) is an area of traditional *federal* concern. In any event, no "clear statement" rule exists in the preemption area, because the most relevant provision of the Constitution – the Supremacy Clause – points in the opposite direction. If the Court concludes that the "presumption against preemption" does apply to this case, then it should take this opportunity to reexamine that doctrine in light of the persuasive criticisms against it by Members of this Court, prominent legal scholars, and litigants in previous cases.

Contrary to petitioner's suggestion, federal preemption of state and local law is exceedingly common – and it poses no threat to federalism. Congress has enacted many statutes with express preemption clauses in a very wide array of settings. Many of those statutes take into account federalism concerns through the creation of limits on preemption, exceptions, and procedures through which state and local governments may seek exemptions from preemption. Still other procedural and consultation rights are provided to state and local governments by the Administrative Procedure Act and by Executive Order 13,132. Federal regulations that expressly preempt state and local law are also common. The federal banking laws and OCC's regulations also reflect an awareness and accommodation of federalism concerns.

There are many excellent reasons why Congress – and administrative agencies – elect to preempt state and local laws. Federal preemption replaces a welter of divergent regulatory requirements imposed by state and local governments with a single, uniform federal rule. It reduces the regulatory burdens on business – and therefore the costs of producing goods and services (leading in many instances to lower prices for consumers). It helps to create and foster unified national markets. Under many preemption regimes created by Congress, it ensures that the rules will be formulated by expert administrative agencies with the benefit of input from all affected parties (including state and local governments) rather than by lay juries, town councils, and other more parochial and less expert regulators. And federal preemption is essential to carrying out any program of *deregulation* at the national level.

II. The OCC's regulations in this case are authorized by the National Bank Act, reflect the agency's interpretations of substantive provisions of that statute, and are entitled to *Chevron* deference under this Court's decisions. See, *e.g.*, *NationsBank*, 513 U.S. at 256-57. Because the Michigan laws at issue in this case squarely conflict with the OCC's regulations, the Michigan laws are preempted by the Supremacy Clause. This Court does not need to go any further to resolve this case.

If the Court does go further, however, it should reject petitioner's request to alter the core principles governing regulatory preemption. There is no merit to petitioner's submission (which this Court has repeatedly rejected) that administrative agencies lack the authority to regulate preemptively unless Congress has explicitly delegated that power. The Court should also reject petitioner's invitation to rule that certain agency interpretations that result in preemption of state and local laws should be accorded no weight by courts or only limited deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). Finally, the reasons advanced for why this Court should carve out a new exception to the *Chevron* doctrine are equally unpersuasive and should be rejected.

ARGUMENT

I. FEDERAL PREEMPTION IS AN ORDINARY, UBIQUITOUS, AND HIGHLY BENEFICIAL FEATURE OF OUR SYSTEM OF GOVERNMENT THAT POSES NO THREAT TO FEDERALISM

From the briefs submitted by petitioner and her *amici*, one might think that Congress's "authority * * * to preempt State laws is an extraordinary power" that threatens to "upset the usual constitutional balance of federal and state powers" and even "intrudes on State sovereignty in violation of the Tenth Amendment." Pet. Br. 11, 26 (internal quotations omitted); see also Br. of the Nat'l Conference of State Legislatures *et al.* ("NCSL Br."), at 4, 15. Building on that premise, petitioner and her *amici* urge the Court to apply a variety of special rules in interpreting the relevant provisions of the National Bank Act and the OCC's regulations and in applying the *Chevron* doctrine – special rules that would not apply if no issue of preemption were raised. See, *e.g.*, Pet. Br. 27 (urging application of a "clear statement" rule).

As we explain below, these arguments largely depend on a mistaken premise – that federal preemption of state and local law is unusual, troubling, constitutionally suspect, and a threat to federalism. In fact, Congress's power to regulate preemptively is beyond dispute and highly beneficial – and Congress ordinarily takes into account, and accommodates, federalism concerns in the preemptive regulatory regimes it creates (including the federal banking statutes). Because so much of petitioner's (and her *amici*'s) arguments are based on a misunderstanding of the constitutional source and status of Congress's power to preempt, it is important to clarify that issue at the outset.

A. The Supremacy Clause, Congress's Power To Regulate Preemptively, And The Distinction Between Express And Implied Preemption

1. Far from being an anomaly or a threat to our system of government, federal preemption of state and local law is an ordinary – and indispensable – incident of our constitutional

scheme. *All* federal laws – including statutes passed by Congress, regulations or rules issued by administrative agencies, and treaties – are preemptive of state and local law to the extent that the latter impose conflicting obligations or requirements. Thus, once Congress passes a law requiring all interstate buses to be lime green, every state, local, and municipal government is thereby precluded from passing laws or ordinances that would punish owners of interstate buses for painting them green or would require those buses to be purple or even forest green.

This result is not anomalous or in any way "extraordinary"; it flows directly from the Supremacy Clause of the Constitution, which the Framers included to remedy a glaring shortcoming of the Articles of Confederation and which broadly provides that "the Laws of the United States * * * shall be the supreme Law of the Land * * * *any* Thing in the *Constitution or Laws* of *any* State *to the Contrary notwithstanding*." U.S. CONST. art. VI, cl. 2 (emphasis added). See *City of New York* v. *FCC*, 486 U.S. 57 (1988) ("The phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization.").

In the last century (and particularly since the New Deal), there has been a vast expansion of federal law in all forms – especially statutes and regulations. By virtue of the Supremacy Clause, the inevitable consequence of that expansion is to restrict the residual authority and police power of state and local governments to take actions that conflict with federal law. *New York* v. *United States*, 505 U.S. 144, 159 (1992) ("As the Federal Government's willingness to exercise power within the confines of the Constitution has grown, the authority of the States has correspondingly diminished to the extent that federal and state policies have conflicted."). This dynamic helps to explain why preemption is so common today and why preemption cases are a regular component of this Court's docket.

2. The Supremacy Clause comes into play only at the post-enactment stage and specifies a rule of federal supremacy when federal and state law conflict. See Viet Dinh, *Reassessing the*

Law of Preemption, 88 GEO. L.J. 2085, 2089-90 (2000) (Supremacy Clause "is relevant only at the post-enactment stage, where a state law conflicts to some degree with a federal law"). This Court has explained the meaning of the Supremacy Clause in a body of cases involving the doctrine of "implied" preemption, a term used to describe situations where there is no explicit preemptive command by Congress ("express" preemption).

The Court has identified several types of implied preemption. Implied *field* preemption occurs where federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Implied *conflict* preemption can take a number of forms, ranging from situations where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-43 (1963), to ordinary conflicts between state and federal law, to cases where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

In resolving cases involving implied conflict preemption, courts undertake three steps: (1) determine the meaning of the federal law in question; (2) determine the meaning of the pertinent state law; and (3) evaluate whether there is sufficient tension or incompatibility between the state and federal provisions to trigger the Supremacy Clause. The first two steps involve questions of statutory construction identical (at least with respect to interpretation of the relevant *federal* statute) to the kinds of interpretations that, when made by administrative agencies, fall within the heartland of the *Chevron* doctrine.[2]

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[2] Only the third step – evaluating the extent of the conflict and whether it suffices to require preemption – arguably involves the resolution of any issue of "constitutional" law. Br. of the Center for State Enforcement of Antitrust Laws, Inc., at 8-9. But even that step may depend upon technical or policy-based judgments about the practical effect of state law on the efficient and effective operation of a complex statutory and

3. Congress's power to legislate preemptively is *not* derived from the Supremacy Clause (which, as explained above, comes into play only at the post-enactment stage). Rather, it flows from the enumerated powers in Article I of the Constitution, including Congress's authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution" those enumerated powers. U.S. CONST. art. I, § 8. It is Congress's enumerated powers that establish "[a] fundamental principle of the Constitution" – "that Congress has the power to preempt state law." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372 (2000).

This constitutional basis is important because it explains why, contrary to the suggestion of petitioner and her *amici*, the exercise of preemptive authority by Congress raises no concern under the Tenth Amendment, which provides that "[t]he powers *not delegated* to the United States by the Constitution, nor prohibited by it to the States, *are reserved* to the States respectively, or to the people." U.S. CONST. amend. X (emphasis added). "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has *not* conferred on Congress." *New York* v. *United States*, 505 U.S. at 156 (emphasis added).

Because Congress's power to legislative preemptively is beyond challenge, the only issue in most cases involving "express" preemption is what Congress *intended*. When Congress includes an express preemption clause in a statute (as it did in Section 484 of the National Bank Act), Congress's intent to preempt state law is obvious and the only remaining issue is the extent of preemption intended. This is an issue of pure statutory

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regulatory scheme – judgments that administrative agencies are uniquely well-suited to make. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 373 (2000) ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects[.]").

interpretation – it is not a "constitutional" issue, as petitioner's *amici* suggest. See Br. of the Center for State Enforcement of Antitrust Laws, Inc. ("Center Br."), at 8-9. Like other issues of statutory interpretation, that question is properly resolved by examining the text, structure and legislative history of the relevant statute. That, too, is precisely what administrative agencies do in resolving ambiguities in statutes they administer – again, an interpretive task that falls into the heartland of what the *Chevron* doctrine covers.

B. "Clear Statement" Rules And The "Presumption Against Preemption"

Petitioner and her *amici* urge this Court to apply a "clear statement" rule or a "presumption against preemption." Pet. Br. 23, 26-27; Br. of Charles W. Turnbaugh, at 11, 19-24. As respondents demonstrate, however, those canons do not apply to this case because the regulation of national banks – including the definition of their "incidental powers" – has long been a subject regulated by the federal government. See *United States v. Locke*, 529 U.S. 89, 108 (2000) (presumption against preemption "is not triggered when [a] State regulates in an area where there has been a history of significant federal presence").

Although that is sufficient reason to reject petitioner's proposed rules of construction, those rules also suffer from more fundamental flaws. For starters, there should not be any "clear statement" rule in the law of preemption, and this Court generally has not used that terminology in its preemption decisions. With good reason: This Court has deployed "clear statement" rules – the strongest form of a federalism-based "substantive" canon of construction – only in areas involving intergovernmental immunity or federal interference with the operations of state government. W. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION 354-62 (2000).[3] See, *e.g.*,

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[3] Professor Eskridge distinguishes among *textual* or *linguistic* canons of construction (which embody "general conventions of language, grammar, and syntax"), *referential* canons (which "refer the Court to an outside or

Gregory v. *Ashcroft*, 501 U.S. 452, 460-61 (1991) (Congress will not be understood to have intruded on "a decision of the most fundamental sort for a sovereign entity," implicating "the structure of [state] government," unless Congress says so in unmistakably clear language); *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention *unmistakably clear* in the language of the statute.") (emphasis added).

In these situations, a "clear statement" rule finds support in constitutional text (such as the Eleventh Amendment). In pre-emption cases, by contrast, the most pertinent constitutional text – the Supremacy Clause – points *in exactly the opposite direction* (in favor of, not against, preemption).[4]

To be sure, this Court has sometimes referred to a weaker federalism-based canon of construction: the "presumption against preemption." But that interpretive rule has not been

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preexisting source to determine statutory meaning"), and *substantive* canons of construction that are "even more controversial, because they are rooted in broader policy or value judgments" and "attempt to harmonize statutory meaning with policies rooted in the common law, other statutes, or the Constitution." W. ESKRIDGE ET AL., *supra*, at 329-30. See also note 4, *infra*.

[4] Justice Scalia has questioned the wisdom of using "preferential rules and presumptions" generally in statutory construction cases, explaining:

> It is hard enough to provide a uniform, objective answer to the question whether a statute, on balance, more reasonably means one thing than another. But it is virtually impossible to expect uniformity and objectivity when there is added, on one or the other side of the balance, a thumb of indeterminate weight. * * * [W]hether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say? I doubt it.

A. SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 28-29 (1997).

consistently applied and is not free from controversy. It has been described by this Court as "artificial," *Locke*, 529 U.S. at 107-08, ignored in many recent cases, *e.g.*, *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 63 (2002) (relying on "natural[] read[ing]" of express preemption clause without any mention of presumption), and squarely rejected as a guide to interpreting express preemption clauses by at least two Members of this Court, *e.g.*, *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 544 (1992) (Scalia, J., joined by Thomas, J., concurring in the judgment in part and dissenting in part) ("Under the Supremacy Clause, * * * our job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning."); *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 457 (2005) (opinion of Thomas, J.) (same). See also *Engine Manufacturers Ass'n* v. *South Coast Air Quality Management Dist.*, 541 U.S. 246, 256 (2004) (observing that "not all Members of this Court agree" on the use of a "presumption against preemption").

The presumption has also come under attack in recent years from legal scholars. See, *e.g.*, Dinh, *supra*, 88 GEO. L.J. at 2087 ("the constitutional structure of federalism does not admit to a general presumption against federal preemption of state law"); Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 S. CT. REV. 175, 182 (presumption is "difficult to justify" on constitutional grounds); Paul Clement & Viet Dinh, *When Uncle Sam Steps In: There's No Real Disharmony Between High Court Decisions Backing Pre-emption And The Federalism Push of Recent Years*, LEGAL TIMES, June 19, 2000, at 66 (arguing that the presumption "finds no support in the structure of the Constitution"). Professor Nelson of the University of Virginia Law School has argued, based on a detailed analysis of long-overlooked historical materials, that the presumption against preemption is contrary to the text of the Supremacy Clause itself, properly understood. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 235-64, 292-93 (2000).[5] Although the

[5] As Professor Nelson has demonstrated, the Framers understood the

dissenting Justices in *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 908 n.22 (2000), made a passing reference to Professor Nelson's argument, and Justice Thomas's separate opinion in *Bates* cited the article favorably in explaining why the "presumption" was irrelevant (see 544 U.S. at 457), this Court has not directly addressed the argument or examined the substantial historical evidence marshaled by Professor Nelson.

Other scholars have traced the history of the preemption doctrine and concluded that, far from being deeply rooted in our legal traditions, the "presumption against preemption" was not recognized by this Court until the 1920s and 1930s. See Mary Davis, *Unmasking The Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 973-83 (2002); Stephen Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 785-808 (1994). Indeed, in the first several decades of the twentieth century, this Court recognized a strong generalized presumption *in favor of* preemption. Davis, *supra*, 53 S.C. L. REV. at 1026; Gardbaum, *supra*, 79 CORNELL L. REV. at 801-08. This contrary presumption is still recognized by this Court when Congress acts in an area "where the federal interest" is "dominant." *E.g.*, *Hines* v. *Davidowitz*, 312 U.S. 52, 62, 68 (1941) (in "the general field of foreign affairs, including power over immigration," state authority must be "restricted to the narrowest of limits").

In several recent cases, the Chamber and other national business groups have filed *amicus* briefs criticizing the "presumption against preemption" on multiple grounds. See, *e.g.*,

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phrase "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" as a "*non obstante*" clause. Such clauses were understood by the courts as a directive *not* to employ the traditional presumption against implied repeals (which might induce strained interpretations to harmonize a federal law with an earlier state regulation), but rather to give a federal statute its most reasonable construction and allow it to displace whatever state law it contravened when so construed. 86 VA. L. REV. at 232, 235-44, 291-303. The *non obstante* form of the Supremacy Clause, then, suggests that judges should *not* automatically prefer a narrow interpretation of a federal statute to avoid the conclusion that it contradicts (and hence preempts) state laws. *Id.* at 232, 245-64.

Br. of the Product Liability Advisory Council, Inc. and the Chamber of Commerce of the United States of America, *United States* v. *Locke*, Nos. 98-1701 and 98-1706, 1999 WL 966527, at *4-12; Chamber Br., *Geier* v. *American Honda Motor Co.*, No. 98-1811, 1999 WL 1049891, at *25-26. Those briefs have demonstrated that the presumption is of relatively recent vintage, has been applied in an inconsistent fashion, suffers from a number of serious ambiguities, and is fundamentally at odds with central principles of preemption law – including that principle that Congress's *intent* determines the scope of express preemption.[6] If the Court concludes (contrary to respondents' submission) that the "presumption against preemption" has any application at all to this case, then it should take this opportunity to reexamine – and abandon or substantially limit – that questionable doctrine.

C. Federal Preemption Is Exceedingly Common And Highly Beneficial

1. Throughout their briefs, petitioner and her *amici* suggest that federal preemption of state law is "extraordinary" and unusual. Pet. Br. 10, 23; NCSL Br. 4, 15. This is untrue. As explained above, the expansion of federal law in its various forms since the New Deal has brought with it a growing sphere of preemption "by direct operation of the Supremacy Clause." *Brown* v. *Hotel & Restaurant Employees & Bartenders Int'l*

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[6] The idea that the presumption rests on principles of federalism is also in tension with the well-settled principle that the importance of a state's interest in a law that is allegedly preempted is *wholly irrelevant* to the preemption analysis. See, *e.g.*, *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) ("These principles [governing preemption analysis] are not inapplicable here simply because real property law is a matter of special concern to the States: 'The relative importance to the State of its own law is not material when there is a conflict with valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'") (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)); *DeCanas* v. *Bica*, 424 U.S. 351, 357 (1976) ("[E]ven state regulation designed to protect vital state interests must give way to paramount federal legislation.").

Union Local 54, 468 U.S. 491, 501 (1984). The more federal statutes and regulations there are on the books, the larger is the domain of potentially conflicting requirements that state and local governments are barred from enacting.

Moreover, Congress has passed an extraordinarily wide array of statutes that expressly preempt specified areas of state and local law. In addition to 12 U.S.C. § 484(a) and other provisions of the federal banking laws, these include the Federal Election Campaign Act, 2 U.S.C. § 453; the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136v; the Packers and Stockyard Act, *id.* § 228c; the Agricultural Marketing Act, *id.* § 1626h; the Plant Protection Act, *id.* § 7756; the Federal Hazardous Substances Act, 15 U.S.C. § 1261 note; the Child Safety Protection Act, *id.* § 1278 note; the Federal Cigarette Labeling and Advertising Act, *id.* § 1334; the Fair Packaging and Labeling Act, *id.* § 1461; the Magnuson-Moss Warranty Act, *id.* § 2311(c); the Terrorism Risk Insurance Act of 2002, *id.* § 6701 note; and the Nutritional Education and Labeling Act, 21 U.S.C. § 343-1.[7] Of course, this list represents only a small fraction of the express preemption provisions currently on the books. Federal preemption is also very common in the areas of copyright, bankruptcy, telecommunications, and labor law.

According to one survey, "[t]he pace and breadth of federal preemptions of state and local authority have increased signifi-

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[7] Other examples include the Poultry Products Inspection Act, 21 U.S.C.§ 467e; the Federal Meat Inspection Act, *id.* § 678; the Egg Products Inspection Act, *id.* § 1052; the Occupational Safety and Health Act, 29 U.S.C. § 667; the Employee Retirement Income Security Act ("ERISA"), *id.* § 1144(a); the Price-Anderson Act, 42 U.S.C. §§ 2210(n)(2), 2014(hh); the Clean Air Act, 42 U.S.C. §§ 7543(a), 7573; the Volunteer Protection Act of 1997, *id.* § 14502; the Hazardous Materials Transportation Uniform Safety Act, 49 U.S.C. § 5125; the Federal Aviation Administration Authorization Act, *id.* § 14501(c); the Safety Appliance Acts, 49 U.S.C. §§ 20301-20306; the Surface Transportation Assistance Act, *id.* § 31114(a); and the General Aviation Revitalization Act, *id.* § 40101 note. See pages 18-20, 25-27, *infra* (discussing additional statutes).

cantly since the late 1960s." U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, FEDERAL STATUTORY PREEMPTION OF STATE AND LOCAL AUTHORITY: HISTORY, INVENTORY, ISSUES, at iii (1992). Thus, "[o]f the approximately 439 significant preemption statutes enacted by the Congress since 1789, more than 53 percent (233) have been enacted only since 1969." *Ibid.*

Preemptive federal *regulations* are also quite common. As explained above, *all* federal regulations are preemptive under the Supremacy Clause insofar as they bar the states from imposing conflicting obligations. But a wide range of administrative agencies also commonly do what the OCC has done here: issue regulations that expressly provide that some domain of state and local law is nullified.[8] Thus, it is simply not true that federal regulations that expressly preempt state law are "thoroughly incompatible with our legal traditions." Center Br. 27.

2. That federal preemption is so common today is hardly surprising. After all, there are many excellent reasons why Congress – and administrative agencies – choose to preempt state and local laws. By last count, there were approximately 87,525 local governmental units in the United States, including more than 3,000 counties, more than 19,000 municipalities, and more than 16,000 towns or townships. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 262 (2004). When Congress prescribes a single set of uniform rules for the entire country, it reduces or eliminates the burdens that

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[8] See, *e.g.*, 5 C.F.R. § 875 (recognizing Office of Personnel Management's preemptive authority over state insurance regulations concerning terms and rates of certain long-term care insurance offered to federal civil servants); 7 C.F.R. § 400.710 (preempting state and local laws imposing taxes on certain federal crop insurance plans and policies); 7 C.F.R. § 1717.301 (preempting state regulatory authority over rates charged by power supply borrowers where rates would compromise federal interests); 10 C.F.R. § 431.26 (preempting certain state regulations that, among other things, set energy conservation standards for electric motors); 11 C.F.R. § 100.93(g) (preempting certain state and local laws "with respect to travel in connection with a Federal election").

flow from multifarious (and even conflicting) legal and regulatory requirements imposed by 50 States and thousands of municipal and local governments.

Federal preemption helps to create a unified national marketplace for goods and services, reduces the barriers to new entry by small businesses, and lowers the cost of doing business (which in turn often results in reduced costs of goods and services to consumers). In many cases, it also ensures that the legal rules governing complex areas of the economy are formulated by expert federal regulators with a broad national perspective rather than by decisionmakers – such as municipal officials, elected state judges, and lay juries – with a far more parochial perspective and limited set of information. See *Geier*, 529 U.S. at 871 (observing that preemption clause "suggests an intent to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many different safety-standard cooks might otherwise create"). Beyond that, the doctrine of federal preemption is the *sine qua non* of any effective policy of deregulation carried out by the political branches of government at the national level.

D. Congress Itself Frequently Addresses The Federalism Concerns Pressed By Petitioner And Her *Amici*

There is another reason why petitioner and her *amici* are wrong in suggesting that Congress's exercise of preemptive legislative power is destructive of federalism and that the OCC (and other federal administrative agencies) are insufficiently attentive to federalism concerns. Petitioner overlooks not only the political safeguards of federalism that exist in the national lawmaking process, see *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550-54 (1985), but also Congress's *own handiwork* in creating preemptive regulatory schemes – including the federal banking laws. She also ignores additional steps taken by Congress, the Executive Branch generally and OCC in particular to ensure that federalism concerns are considered.

1. As respondents show, the federal banking statutes and OCC's regulations contain a variety of provisions that reflect Congress's (and the OCC's) awareness of federalism issues and solicitude for state prerogatives in regulating specified activities. See, *e.g.*, 12 U.S.C. § 1844(c)(4)(A) (recognizing certain state authority to regulate "[s]ecurities activities" that are "conducted in a functionally regulated subsidiary of a depository institution"); *id.* § 1844(c)(4)(B) (same for "insurance agency and brokerage activities and activities as principal"); 12 C.F.R. § 34.4(b) (specifying, among other things, that state contract, taxation, and zoning laws are not preempted as applied to national banks' real estate lending powers). Moreover, in a few specific areas (such as branching and interest rates), Congress has elected to define the power of national banks by reference to the powers granted to state banks in the state where the national bank is located. See 12 U.S.C. §§ 36, 85. And Congress has directed the OCC to follow notice-and-comment procedures "[b]efore issuing any opinion letter or interpretive rule * * * that concludes that Federal law preempts the application to a national bank of any State law regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches." 12 U.S.C. § 43(a).

2. Other preemptive federal schemes outside of the area of banking law also include special safeguards – both substantive and procedural – that protect and preserve the authority of state and local governments to regulate and to meet their own operational needs. The existence of these provisions – which are so often overlooked by courts in preemption cases – confirms that, contrary to petitioner's submission, the political safeguards of federalism are in very good working order.

Five examples of Congress's accommodation of state and local governments' interests in other preemption settings are illustrative. *First*, Congress often elects *only* to preempt state and local laws that *are different from* federal law, thus leaving intact state and local laws that are identical or similar to federal mandates. See, *e.g.*, Consumer Product Safety Act, 15 U.S.C. § 2075(a) (preempting state safety standards "unless such

requirements are identical to the requirements of the Federal standard"); Medical Device Amendments, 21 U.S.C. § 360k(a).

Second, Congress frequently places an exclusion within express preemption clauses for goods or products purchased by states or local governments *for their own use*. Examples include the preemption provisions of the Flammable Fabrics Act, 15 U.S.C. § 1203(b), the Federal Hazardous Substances Act, 15 U.S.C. § 1261 note, and the Poison Prevention Packaging Act, 15 U.S.C. § 1476(b). These exclusions preserve the authority and autonomy of state and local governments to make procurement and spending decisions.

Third, Congress sometimes includes in a preemption scheme an exception for state or local requirements that are *needed to address special or unique local conditions*. The Federal Railroad Safety Act, for example, excludes certain "additional or more stringent" measures taken by a state "related to railroad safety or security" where the state's regulation, among other things, "is necessary to eliminate or reduce an essentially local safety or security hazard." 49 U.S.C. § 20106. See also 46 U.S.C. § 4306 (Boat Safety Act) (excluding certain state or local regulations concerning "uniquely hazardous conditions or circumstances within the State").

Fourth, Congress often *authorizes the granting of exemptions* to state and local governments under an express preemption scheme. Although these provisions vary somewhat in form, they typically allow the administrative agency to grant exemptions if a state or local standard: (1) provides a higher degree of protection than applicable federal standards; (2) does not unduly burden interstate commerce; and (3) does not cause the product to be in violation of any federal requirements. See, *e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2617(b); Federal Hazardous Substances Act, 15 U.S.C. § 1261 note.

Fifth, Congress has sometimes specifically created a role for the states *in setting the preemptive federal standards*. The Federal Boat Safety Act, for example, provides for state input into the Coast Guard's process of formulating uniform federal

design standards for recreational boats. The Coast Guard is required to "consult with" the National Boating Safety Advisory Council ("NBSAC"), 46 U.S.C. § 4302(c)(4), a group of experts and other persons interested in boat safety. One-third of the 21 members of the NBSAC must be state officials responsible for state boat safety programs. See *id.* § 13110(b)(1).

3. Finally, Congress and the Executive Branch have created additional *procedures* that give state and local governments the opportunity to be heard before federal administrative agencies issue regulations that would preempt state and local authority. In preemption statutes that authorize the administering agency to grant exemptions from preemption, Congress often provides state and local governments with the opportunity for an administrative hearing on their requests for an exemption from preemption. See, *e.g.*, 21 U.S.C. § 360k(b) (Medical Device Amendments). More generally, the Administrative Procedure Act is itself a federalism safeguard because it requires an agency engaged in informal rulemaking to provide notice and an opportunity to be heard to all interested parties. 5 U.S.C. § 553(c); see also *id.* § 553(e) (requiring every agency to give interested parties "the right to petition for the issuance, amendment, or repeal of a rule"). If unsuccessful in obtaining an exemption from preemption or in opposing a preemptive regulation, state and local governments may seek judicial review of adverse agency action in the federal courts.[9]

4. Thus, Congress knows full well how to take into account the prerogatives of state and local governments in designing preemptive federal schemes, including the federal banking laws. There is accordingly no need for this Court to bend over backwards by systematically disfavoring the outcome of preemption. Congress's frequent use of these various methods of accommodating state and local interests confirms the funda-

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[9] The Executive Branch has imposed additional consultation requirements on administrative agencies that are contemplating preemptive regulatory action. See Executive Order 13,132, 64 Fed. Reg. 43,255, §§ 4(d), (e), 6 (Aug. 4, 1999).

mental point made in *Garcia*: the political safeguards of federalism are alive and well. And Congress's decision not to include *additional* safeguards in the National Bank Act – such as a procedure for seeking exemptions from preemption – should be regarded not as happenstance but as a deliberate choice.

II. THIS COURT SHOULD DECLINE PETITIONER'S INVITATION TO ALTER THE ESTABLISHED LEGAL FRAMEWORK GOVERNING REGULATORY PREEMPTION

The Chamber agrees with respondents that the relevant OCC regulations are authorized by the National Bank Act, reflect the agency's interpretations of substantive provisions of that statute, and are entitled to *Chevron* deference under this Court's decisions. Because they plainly conflict with the OCC's regulations, the Michigan laws at issue are preempted by the Supremacy Clause. The Court need go no further.

Accordingly, there is no need to address the degree of deference owed to either (1) the OCC's interpretation of the National Bank Act's provisions specifying that operating subs are to be "subject to the same terms and conditions" as national banks (12 U.S.C. § 24a(g)(3)) and expressly preempting state visitorial powers over national banks (12 U.S.C. § 484(a)), or (2) the agency's assessment of whether state regulations of the kind involved here conflict with or frustrate the purposes underlying the National Bank Act and the OCC's regulations. If there were a need to address these issues, however, this Court's decisions establish that substantial deference is owed to the agency in both of these settings. In *Medtronic Inc.* v. *Lohr*, 518 U.S. 470, 496 (1996), this Court gave "substantial weight" to the FDA's interpretation of the express preemption clause of the Medical Device Amendments, 21 U.S.C. § 360k(a), and it explained that the agency was "uniquely qualified" to determine whether state law undermines Congress's purposes. And in *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 883-84 (2000), this Court deferred to the Department of Transportation's views concerning the objectives underlying an agency

safety standard and the extent to which state law would pose an obstacle to the accomplishment of those objectives.

Petitioner and her *amici* ask this Court to make significant changes to settled law. Thus, they urge the Court to hold that an administrative agency lacks the authority to regulate preemptively *unless* Congress has specifically conferred preemptive regulatory authority on the agency. They also contend that the OCC's views with respect to preemption are entitled to little or no weight and are subject, at most, to minimal deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). These arguments are meritless and should be rejected.

A. The Power Of An Administrative Agency To Regulate Preemptively Is Not Contingent On An Express Delegation By Congress Of Preemptive Authority

In *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982), this Court examined "the pre-emptive effect of a regulation, issued by the Federal Home Loan Bank Board (Board), permitting federal savings and loan associations to use 'due-on-sale' clauses in their mortgage contracts." *Id.* at 144. In a statement issued with the final publication of the due-on-sale regulation, the Board "explained its intent that the due-on-sale practices of federal savings and loans be governed 'exclusively by Federal law.'" *Id.* at 147. A California court recognized that the Board intended to preempt state law that conflicted with its due-on-sale regulation, but nonetheless "refused to 'equate the *Board's* expression of intent with the requisite *congressional* intent.'" *Id.* at 150 (emphasis in original).

In rejecting the lower court's approach, this Court explained:

> Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review *only* to determine whether he has exceeded his statutory authority or acted arbitrarily. When the administrator promulgates regulations intended to pre-empt state law, the court's inquiry *is similarly limited*: "If [h]is choice represents a reasonable accommodation of conflicting policies

> that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *A pre-emptive regulation's force* ***does not depend*** *on express congressional authorization to displace state law* * * * .

de la Cuesta, 458 U.S. at 153-54 (emphases added) (quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961)). This Court has applied these principles both before and after *Chevron*. See, *e.g.*, *City of New York* v. *FCC*, 486 U.S. 57, 63-69 (1988); *Hillsborough County, Fla.* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714-15, 721 (1985); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 699-705, 708-09 (1984).

In *New York* v. *FERC*, 535 U.S. 1 (2002), the Court recently reaffirmed its traditional approach, squarely rejecting the argument that the "presumption against preemption" should be applied in deciding whether an agency has the authority to take regulatory action that preempts state law. The "presumption against preemption," the Court explained, has no bearing on issues relating to "the proper scope of * * * federal power" (including an agency's power to preempt state law). *Id.* at 18. The only question is "whether Congress has given [the agency] the power to act as it has," and that question is resolved "without any presumption one way or the other." *Ibid.*

This approach is entirely sensible. Once Congress has delegated rulemaking power to an agency, the agency steps into Congress's shoes as the decisionmaker – its job becomes implementing the statute in whatever way best accomplishes the statutory aims. See, *e.g.*, *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996) ("We accord deference to agencies under *Chevron* * * * because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."); *Crisp*, 467 U.S. at 708.

Because an agency is left to make policy choices, it need not shy away from preemption; it need adhere only to the presumption that Congress wanted the statute administered effectively. The agency is no more obligated to avoid preemption than is *Congress* when determining whether federal regulation should be exclusive.

Once this Court determines that the agency has the power to administer the statute, the focus shifts to whether *the agency* (not Congress) intended its regulations to preempt state law. For example, in *Hillsborough County*, the Food and Drug Administration (FDA) issued a statement at the time its regulations were promulgated *disclaiming* an intent to preempt state law. The Court found this disclaimer "*dispositive* on the question of implicit intent to pre-empt"; so long as the agency acted within the scope of its statutory authority, *it* (not Congress) had the discretion to decide whether to preempt state law. 471 U.S. at 714-15 (citing *Chevron*, 467 U.S. at 842-45) (emphasis added). Moreover, this Court observed that "the FDA possesses the authority to promulgate regulations pre-empting local legislation that imperils the supply of plasma *and can do so with relative ease*." *Id.* at 721 (emphasis added).

Despite this unbroken line of decisions, petitioner and her *amici* ask this Court to curtail significantly the power of federal agencies to issue preemptive regulations by holding that such power exists *only* where Congress explicitly grants the power to regulate preemptively. Pet. Br. 33-35; Center Br. 25-28. Contrary to the Center's suggestion (Br. 1, 28), this would hardly amount to a mere "clarification" of this Court's decisions. It would bring about a major and unwarranted change, in effect overruling *de la Cuesta* and its progeny.

Equally mistaken is the Center's suggestion (Br. 26-28) that this line of cases can be explained away as turning on "straightforward question[s]" of implied "conflict preemption" under the Supremacy Clause. In fact, this Court has made clear that the *de la Cuesta* framework applies even when an administrative agency elects to "render unenforceable state or local laws that

are *otherwise not inconsistent with federal law.*" *City of New York*, 486 U.S. at 63-64 (emphasis added); see also *Crisp*, 467 U.S. at 705 ("*Quite apart from* this *generalized* federal preemption of state regulation of cable signal carriage [under the FCC's regulations], the Oklahoma advertising plainly conflicts with specific federal regulations.") (emphasis added). That this Court in *de la Cuesta* "provided an apt summary of" preemption doctrine (Center Br. 27) is further reason to reject *amicus*'s suggestion that the Court somehow overlooked preemption principles in deciding that case.

Thus, the Center is quite wrong in contending that "*[i]n addition to* asking whether the agency intended to preempt and whether the agency acted within the scope of its authority, the court *must always ask* whether displacement of state law is *required* under traditional preemption doctrine." Center Br. 27 (emphasis altered). Under *de la Cuesta*, that judgment is left to the agency's discretion – and the agency may elect to regulate preemptively even if traditional principles of implied conflict preemption would not "require" that outcome. Nor have federal administrative agencies become "runaway engines of preemption" (Center Br. 27) in the approximately 25 years since *de la Cuesta* was decided. This Court accordingly should reject petitioner's unfounded request to abandon the well-settled *de la Cuesta* framework notwithstanding the principle of *stare decisis*. Petitioner has not even come close to providing the requisite "special justification" for overruling this line of decisions. See *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984).

B. The OCC's Views Are Entitled To More Than *Skidmore* Deference Under This Court's Decisions

Petitioner and her *amici* further maintain that this Court should apply no deference – or at most, only *Skidmore* deference – to the OCC's determinations. Pet. Br. 31-38; AARP Br. 3-4, 13-18; Center Br. 8-21. These arguments are mistaken.

This Court's decision in *Medtronic* applied more than merely *Skidmore* deference to the FDA's interpretation of an express

preemption clause. At issue was the preemption provision of the Medical Device Amendments, 21 U.S.C. § 360k(a):

> [N]o State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use *any requirement* –
>
> (1) which is different from, or in addition to, *any requirement* applicable under this chapter to the device, and
>
> (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

21 U.S.C. § 360k(a) (emphasis added). The FDA had issued a regulation (21 C.F.R. § 808.1) interpreting Section 360k(a)'s references to "any requirement" as being limited to requirements that were "specific" in nature (or not of "general applicability"). See 518 U.S. at 498-500.

Writing for the Court, Justice Stevens explained that "our interpretation of the pre-emption statute is *substantially informed* by" the FDA's regulation and there is a "sound basis" for giving "*substantial weight* to the agency's view of the statute." 518 U.S. at 495-96 (emphasis added). The Court explained that, as the agency to which Congress "has delegated its authority to implement the provisions of the Act," the FDA was "uniquely qualified to determine whether a particular form of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress * * * and, therefore, whether it should be pre-empted." *Id.* at 496. In a concurring opinion, Justice Breyer also placed substantial weight on the FDA's interpretation of Section 360k(a). See *id.* at 505-06 (Breyer, J.) (it "makes sense" to infer that FDA "possesses a degree of leeway to determine which rules, regulations, or other administrative actions will have pre-emptive effect").

It is clear that the Court in *Medtronic* applied more than merely *Skidmore* deference. Under *Skidmore*, courts give due consideration to the agency's views and accord those views

more or less weight depending on "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore*, 323 U.S. at 140. Yet this Court in *Medtronic* did not engage in that kind of analysis but rather pointed to the FDA's institutional role (an analysis more in keeping with *Chevron*).

Moreover, had this Court in *Medtronic* examined the *Skidmore* factors, it would have concluded that there were good reasons *not* to give any weight to the FDA's interpretation. As for the validity of the "specificity" gloss, this Court has rejected it in other preemption settings on the ground that it would create "an utterly irrational loophole." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992) (discussing preemption under the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a)(1)); accord *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 47-48 (1987) (ERISA preemption); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244 & n.3 (1959) (NLRA preemption). As for the consistency of the FDA's views relating to the "specificity" gloss, it is significant that in *Medtronic*, the Solicitor General, representing the agency, filed an *amicus* brief effectively disavowing the FDA's "specificity" gloss and pointedly declining to urge the Court to give that interpretation any deference.[10] Had this Court been applying *Skidmore* deference, it surely would have counted the FDA's inconsistency as weighing against according any deference to the agency's "specificity" gloss.

Thus, acceptance of the argument of petitioner and her *amici* that only *Skidmore* deference (or something less) is

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[10] See Nos. 95-754, 95-886 U.S. Br. 24 n.19 (conceding that FDA's regulations concerning Good Manufacturing Practices, which are general in nature and apply to numerous types of devices, are federal "requirements" that trigger preemption under Section 360k(a)); *id.* at 18 (noting that the language of Section 360k(a) "suggests that * * * a [state] requirement *may be one of general applicability*") (emphasis added).

appropriate in this setting is inconsistent with *Medtronic* and would undermine the basis for that decision.

C. Petitioner's Arguments For An Exception To The *Chevron* Doctrine Are Unpersuasive

Finally, petitioner and her *amici* fare no better in their attempts to explain why the *Chevron* doctrine is categorically inapplicable to an administrative agency's interpretation of an express preemption clause or its determination that state law either conflicts with federal law or stands as an obstacle to the full accomplishment and execution of Congress's purposes.

Contrary to the suggestion of petitioner and her *amici*, not all issues of federal preemption present "questions of *constitutional* law." Center Br. 9 (emphasis added); see also Pet. Br. 32 (preemption is "a legal question within the expertise of courts"). As explained above, express preemption cases typically turn on Congress's intent and thus present ordinary issues of statutory interpretation. See pages 9-10, *supra*. So, too, do cases involving implied field preemption. See *id.* at 8. And cases involving implied *conflict* or *obstacle* preemption are at least "partly a matter of interpretation of federal statutory and regulatory law" (Center Br. 8) as well as state law. See page 8, *supra*. These are precisely the kinds of interpretive judgments that are routinely accorded *Chevron* deference outside the preemption setting.

Moreover, as this Court recognized in *Medtronic*, a federal agency may be "uniquely qualified to determine whether a particular form of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 518 U.S. at 496 (internal quotations omitted). Often this determination requires an understanding not only of how a complex regulatory scheme works and affects the real-world conduct of regulated parties but also of how the imposition of diverse state and local requirements affects that scheme and those regulated parties. See note 2, *supra*. It may also involve an identification of Congress's various purposes (which may be in tension with each other) and an assessment of the

likely impact of state and local regulations on those purposes. Thus, while the doctrine of conflict preemption is rooted in the Supremacy Clause, the agency's interpretations in these settings are little different from other interpretations that draw on the agency's expertise and specialized knowledge and to which *Chevron* deference is accorded.

Furthermore, the Center's arguments on this score incorrectly assume that an administrative agency may decide to preempt state and local law only after determining whether "any resulting tension between federal law and state law [is] sufficiently great to *require* the displacement of the state law by the federal law." Center Br. 2 (emphasis added). But an agency delegated rulemaking authority by Congress is not required to determine that implied conflict preemption exists under the Supremacy Clause before deciding to regulate preemptively. Agencies, just like Congress, may elect to preempt state law that is *entirely consistent with* – indeed, that mirrors – federal law. See, *e.g.*, Airline Deregulation Act, 49 U.S.C. § 41713 (preempting all state laws that "relate[] to a price, route, or service of an air carrier"); ERISA, 29 U.S.C. § 1144(a) (with certain exceptions, preempting state laws that "relate to any employee benefit plan"). And agencies, like Congress, can use preemption to ensure that an entire area is completely unregulated by state and federal regulations – even if state and local governments have yet to legislate in the area. See *Arkansas Electric Coop. Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 384 (1983) ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate.") (emphasis in original). The Center's suggestion that agencies do exactly the same thing as judges in implied conflict preemption cases is thus mistaken.

Equally incorrect is the argument that *Chevron* deference is unwarranted because courts have developed the law concerning express and implied preemption. Pet. Br. 32; Center Br. 9-11. As just explained, agency judgments about the meaning of

express preemption clauses turn on Congress's intent; they do not necessarily depend on the scope of the various doctrines of implied preemption or other concepts that *courts* apply in adjudicating preemption issues. Moreover, this argument proves too much. Courts have developed a variety of textual, referential, and substantive canons of statutory construction. See note 3, *supra*. Like the "presumption against preemption," these canons often are used by agencies in interpreting statutory ambiguities. But the mere fact that agencies use these court-developed rules of statutory construction hardly means that their interpretive efforts thereby fall outside of the proper reach of the *Chevron* doctrine.

Nor is it correct that *Chevron* is categorically inapplicable because "preemptive regulations of the sort at issue here have the direct and intended effect of expanding the agency's own jurisdiction." Pet. Br. 32; see also Center Br. 12-15. The agency's jurisdiction remains the same whether it elects to regulate concurrently with state and local governments or to regulate preemptively. Put differently, the decision to regulate preemptively does not "expand" the agency's jurisdiction to new objects of regulation; it merely assures that subordinate government actors will not *also* act within that jurisdiction.

It is true that agency decisions concerning preemption "affect the federal-State balance" (Pet. Br. 33; see also Center Br. 11-12), but as explained above preemption is an ordinary feature of our scheme of government and not a threat to "federalism." *Every* federal regulation "affects the federal-State balance" because, under the Supremacy Clause, it limits the power of state and local governments to take conflicting action. In any event, Congress has often taken steps – as it did in the federal banking laws at issue here – to accommodate the interests of state and local governments. In sum, petitioner and her *amici* provide no sound reason to create a wholesale exception to the *Chevron* doctrine.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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